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No. 87-1223

In the Supreme Court of the United States

OCTOBER TERM, 1987

GER-SHEP, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court correctly instructed the jury on the interstate commerce element of an offense under Section 1 of the Sherman Act.

2. Whether the government introduced sufficient evidence that petitioners engaged in a conspiracy.

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OPINIONS BELOW

The court of appeals' judgments affirming petitioners' convictions (Pet. App. A1-A15) are reported at 833 F.2d 308 (Table). The district court's opinion on petitioner's post-trial motions (Pet. Supp. App. SA1-SA21) is unreported.

JURISDICTION

The judgments of the court of appeals were entered on October 19, 1987. A petition for rehearing was denied on November 12, 1987 (Pet. App. A16-A17). The petition for a writ of certiorari was filed on January 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the Eastern District of Pennsylvania, petitioners were convicted of conspiring to allocate territories, fix prices, and submit rigged bids, in violation of Section 1 of the Sherman Act (15 U.S.C. 1). The conspiracy concerned municipal and state contracts for the purchase and application of hot-mix asphalt in Lancaster County, Pennsylvania.

Two of petitioners' co-conspirators, Eugene Burkholder and Thomas Nock, testified for the government. They described the meetings at which the illegal agreements were reached and how those agreements were implemented. Their testimony was supported by documents, including bid and telephone records and the notes of one conspirator that showed the allocated territories. A competing hot-mix producer also testified about the conspirators' attempts to obtain his cooperation.

Burkholder testified that, in 1977 and 1978, extremely competitive conditions prevailed in Lancaster County; producers hauled long distances for relatively low prices (C.A. App. 571a, 582a, 973a-977a). Because Burkholder was concerned about the profitability of his paving company, he arranged a meeting of his Lancaster County competitors in late 1978, just prior to the 1979 season for bidding on government contracts (*id.* at 564a, 568a, 572a-576a). Burkholder, petitioners Sweigart and Schell, and Sweigart's superior Charles McMinn attended this meeting (*id.* at 577a).[1]

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[1] Petitioner Schell owned petitioners Ger-Shep, Inc. and KLP, Inc. McMinn, the owner of petitioners McMinn's Asphalt Co., Inc. and McMinn's Asphalt Products, Inc., died prior to the indictment in this case. Petitioner Sweigart did bidding for McMinn's companies and succeeded him as president. C.A. App. 617a, 2516a-2517a, 2523a-2525a.

At the meeting, Burkholder proposed that the competing hot-mix producers quit bidding on distant jobs. He proposed that they "bid basically in the municipalities surrounding our plants" (C.A. App. 582a-583a). The others at the meeting agreed to this proposal and the participants allocated Lancaster County municipalities based on this principle (*id.* at 583a-584a, 587a-597a).[2] The participants also agreed to "attempt to increase the price" (*id.* at 581a) by setting "parameters" for their posted prices; the posted prices, in turn, formed the basis of their bids to the state and municipalities (*id.* at 584a-587a, 603a-607a, 985a-986a).

At a second meeting, held in December 1979 prior to the 1980 bid season, the same individuals used a typewritten list again to allocate Lancaster County municipalities. Burkholder testified that, during the discussion, everyone at the meeting took notes on his copy of the list (C.A. App. 607a-616a). The group also discussed the levels that posted prices "should be," and again agreed on pricing "parameters" (*id.* at 616a-617a).

The conspirators held a third meeting in February 1981, prior to the 1981 bid season. Burkholder and Nock, whose company had purchased Imperial Blacktop from Schell in the period between the second and third meetings, testified that this meeting covered the same two topics—allocating territories and fixing price ranges. Petitioners discussed and agreed on adjusting posted prices upward, and agreed on "who would get certain municipalities" (C.A. App. 619a-626a, 639a, 1900a-1907a, 2033a-2036a, 2069a-2070a,

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[2] At trial, Burkholder listed the territorial allocations that he could recall. The evidence showed that in 1979 the assigned conspirator (or an outsider to the conspiracy) bid and won in almost every case in accordance with the allocations Burkholder described. C.A. App. 591a-597a; GX 79.

2077a-2084a).[3] The participants again used typewritten lists to allocate territories.[4] Nock's firm was assigned the municipalities previously allocated to Imperial Blacktop (*id.* at 623a-625(1)a, 1905a-1907a, 2032a-2036a).

Petitioners Schell and Sweigart attended a final meeting in December 1981 to discuss the 1982 bid season. Once again, the participants agreed on ranges of posted prices and generally reaffirmed the allocated territories by using a typed list. McMinn's company was given the territory of one of Schell's companies that it had acquired (C.A. App. 670a-679a, 686a-690a, 1923a-1925a).[5]

The government corroborated the testimony of Burkholder and Nock in several ways. James Carr, an out-of-

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[3] Nock testified that when his company was negotiating for the purchase of Imperial Blacktop, he expressed concern that Schell's asking price was too high for the projected earnings. Petitioner Schell reassured Nock that there were three or four townships that Nock would "automatically get that went with the plant" (C.A. App. 1885a-1888a, 2050a). Nock understood this to mean that his bids would be uncontested by competitors in the area (*id.* at 1889a).

[4] The testimony about the use of a typewritten list to assign territories was corroborated by documentary evidence. A list of municipalities (GXs 207A, 207B) brought back by one conspirator from the meeting in 1981 had initials corresponding to members of the conspiracy placed next to the various municipalities (C.A. App. 1139a-1143a, 1154a-1156a). Burkholder confirmed that this was the type of list used at the meetings to divide territories (*id.* at 693a-695a). Moreover, bidding records for Lancaster County municipalities showed a very close relationship in 1981 between the handwritten notations on the list and the successful bidders (GX 81; C.A. App. 1269a-1292a).

[5] In addition to their testimony about territorial allocations and agreements on posted prices, Burkholder and Nock discussed the conspirators' frequent use of complementary bids (C.A. App. 618a-620a, 725a-763a, 794a-814a, 994a-995a, 1949a-1953a, 2075a-2076a). Such bids are intentionally high to create the impression of competition when there is none (*id.* at 619a).

county competitor, testified that Burkholder, McMinn, and Sweigart had told him that they were displeased about his low bids in Lancaster County and had asked him to "call" about future bids (C.A. App. 1435a-1441a, 1470a-1472a; see also *id.* at 704a-718a). The government also introduced evidence that, during the conspiracy, prices were about 10 to 20% higher in Lancaster County than in five surrounding counties of the same rural character (*id.* at 2120a-2124a; GXs 220-228).

The court of appeals affirmed petitioners' convictions by unpublished orders (Pet. App. A1-A15). The court held, inter alia, that the evidence was sufficient to support petitioners' convictions.

ARGUMENT

Petitioners claim (Pet. 8-13) that the trial court's supplemental jury instruction on the interstate commerce element of a Sherman Act violation was erroneous. They also claim (Pet. 13-16) that there was insufficient evidence to support their convictions. Neither of those contentions is correct. Accordingly, this fact-specific case does not warrant review by this Court.

1. Petitioners acknowledge (Pet. 12) that the trial court's general instruction to the jury on the interstate commerce element of a Sherman Act violation was correct. They assert, however, that the trial court's instruction given in response to a jury question incorrectly relieved the government of proving the jurisdictional interstate commerce element. Petitioners also argue that, in a case alleging a per se antitrust violation, the jurisdictional element cannot be met by proof of an effect on interstate commerce; the proof must show a transaction actually in interstate commerce.

Petitioners did not raise these two related contentions in their main brief in the court of appeals. Petitioners Schell, Ger-Shep, Inc., and KLP, Inc. raised them for the first time in their reply brief.[6] At oral argument in the court of appeals, the government noted that issues cannot be raised for the first time in a reply brief. See 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3974, at 428 & n.24 (1977). And the court of appeals did not refer to these contentions when it summarily affirmed petitioners' convictions. Hence, this Court should adhere to its general policy of not deciding "questions not raised or resolved in the lower court." *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976).

In any event, petitioners' objections to the trial court's supplemental jury instruction are plainly wrong. In the supplemental instruction, the trial court carefully distinguished between the interstate commerce element and the question of unreasonable restraints of trade. The court informed the jury (C.A. App. 3249a):

> Now, you don't have to worry about unreasonable, because the charge here, by definition, is unreasonable, price-fixing, et cetera. But you do have to worry about interstate commerce.

The court then told the jury that it must decide the interstate commerce issue before it considered whether a conspiracy existed (*id.* at 3250a).[7] The court reminded the jurors that the government could prove the interstate

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[6] The remaining petitioners plainly waived this claim by not objecting to the challenged instruction at trial (Pet. Supp. App. SA4; C.A. App. 3264a).

[7] The court told the jury that "[i]f the government does not prove the interstate commerce connection, * * * your verdict should be not guilty as to all defendants" (C.A. App. 3248a).

commerce element under either of two theories—that the challenged activity involved a substantial amount of interstate commerce or that it substantially affected interstate commerce (*id.* at 3249a-3253a). The court then summarized the parties' factual contentions concerning those two theories (*id.* at 3253a-3259a).[8] Finally, the court read from the Third Circuit's decision in *United States* v. *Fischbach & Moore, Inc.*, 750 F.2d 1183 (1984), cert. denied, 470 U.S. 1085 (1985), so that the jury would "have the exact law on the subject" (C.A. App. 3263a-3264a). This quotation set forth the government's standard of proof under the two tests (Pet. App. A20).[9] The court concluded by reminding the jury that, if it found that petitioners engaged in price-fixing and bid-rigging as charged, such conduct is presumed to be an unreasonable restraint on trade so that "the government is not required to prove any *adverse* impact on interstate commerce" (C.A. App. 3263a-3264a (emphasis added)).

The trial court thus clearly instructed the jury that the government was required to prove that the challenged activity involved a substantial amount of interstate commerce or that it had a substantial effect on interstate commerce. The government was not relieved of its burden on this element. The trial court made clear that the question of an

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[8] There was ample evidence to support the government's case under either theory. The government showed that the conspirators spent millions of dollars to buy AC-20, a key ingredient in hot-mix, from out-of-state sources during the course of the conspiracy (C.A. App. 719a-725a, 1012a-1031a, 1041a-1061a, 1072a-1073a, 1147a-1148a, 1178a-1179a). In addition, the companies obtained necessary bonds from out-of-state companies (*id.* at 1181a-1190a).

[9] The court stated that the government must prove, inter alia, that the challenged activity involved a "substantial volume of interstate commerce" or had a "substantial effect on interstate commerce" (Pet. App. A20).

unreasonable restraint on trade (*i.e.*, adverse impact) was a separate matter. Because the conduct charged in the indictment was per se illegal, the court properly instructed the jury that the government need not prove that the substantial effect on interstate commerce was "adverse." There was plainly nothing inconsistent about the trial court's requiring the government to show a substantial effect on interstate commerce, but relieving the government of an obligation to show an actual adverse impact on competition. See *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 785 (1975).

Petitioners contend (Pet. 8-10) that the government should not be permitted to use a "substantially affecting" theory to establish the interstate commerce element in a case alleging a per se violation of the Sherman Act. There is no support for this argument. None of the decisions cited by petitioners for their contention (Pet. 9-10) suggests that a "substantially affecting" theory cannot be applied in a per se case. Indeed, in *Goldfarb* v. *Virginia State Bar*, a case involving per se illegal price-fixing (421 U.S. at 778, 781-783), this Court applied an "affecting commerce" test in holding that the evidence satisfied the jurisdictional interstate commerce requirement (*id.* at 785). See also *United States* v. *Azzarelli Const. Co.*, 612 F.2d 292, 294-295 (7th Cir. 1979), cert. denied, 447 U.S. 920 (1980) (rejecting claim that per se violation can occur only in "flow" of commerce situation, not in an "affecting commerce" case). Accordingly, the trial court properly instructed the jury on the interstate commerce element of a Section 1 violation.

2. Petitioners next argue (Pet. 4, 13-16) that the government's evidence was consistent with lawful conduct and that the government's case would not have survived summary judgment in a civil action. Petitioners' argu-

ment, at bottom, is a challenge to the sufficiency of the evidence. As the trial court correctly noted (2/20/87 Hearing 64), however, there was "[o]verwhelming * * * evidence of guilt" in this case.

Unlike *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), on which petitioners rely (Pet. 14), this case does not involve ambiguous circumstantial evidence. As related above, the government proved the existence of the conspiracy through the testimony of two witnesses who were involved in the conspiracy. This testimony was supported by bid records, telephone records, a document setting forth the territorial allocations, and the testimony of a competitor who had been urged not to bid successfully in Lancaster County. Thus the lower courts correctly held that the evidence was sufficient to support petitioners' convictions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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